BUKIT RINGGIT HOLDINGS SDN BHD v. BUKIT UNGGUL GOLF AND COUNTRY RESORT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABU BAKAR JAIS J
[SUIT NO: 22NCVC-1193-12-2011]
15 DECEMBER 2016

CONTRACT: *Specific performance – Sale and purchase agreement – Failure to deliver vacant possession of land – Claim for damages – Assessment of – Whether there was rescission and cancellation of contract – Whether court could award damages in lieu of specific performance – Whether plaintiff entitled to claim for both refund and damages in lieu of specific performance – Unjust enrichment – Whether arose – Specific Relief Act 1950, ss. 18, 36*

This was an appeal to the judge in chambers by the defendant against the decision of the Senior Assistant Registrar ('SAR') for assessment of damages *in lieu* of specific performance where the SAR awarded the plaintiff damages of RM1,529,550 after the assessment. The plaintiff and the defendant entered into a sale and purchase agreement ('SPA') where the defendant agreed to sell to the plaintiff a plot of bungalow land situated in a proposed development project. The defendant, however, failed to deliver vacant possession of the land after 15 years. As a consequence, the plaintiff sued the defendant and prayed for, *inter alia,* (i) specific performance of the SPA; (ii) damages in addition to specific performance; and (iii) in the alternative, the defendant refunds RM117,612.50 and pay damages to be assessed in addition to the sum RM117,612.50 to the plaintiff *in lieu* of specific performance. Thereafter, the plaintiff obtained summary judgment pursuant to O. 81 r. 1 of the Rules of the High Court 1980. Pursuant to the summary judgment, the judge ordered the defendant to pay the said sum of RM117,612.50 and to pay damages to be assessed. Based on, among others, the valuation report, the SAR awarded RM1,529,550 as damages to the plaintiff, which was not inclusive of the amount of RM241,094.44 paid by the defendant to the plaintiff before the assessment of damages by the SAR, being refund of RM117,612.50 and interest because the SPA was not performed. The defendant contended that the SAR failed to consider applicable principles and had instead considered wrong legal principles in assessing damages for this case. According to the defendant, the SAR failed to realise that the judge did not allow specific performance of the SPA but only allowed the alternative prayer of the refund of the sum of RM117,612.50, and that the damages assessed by the SAR could not be *in lieu* of specific performance because the SPA was already rescinded and cancelled, thus no contract could be specifically performed. The plaintiff, on the other hand, argued that it was entitled to both refund and damages *in lieu* of specific performance as the plaintiff had never prayed for the rescission or cancellation of the SPA and that the damages *in lieu* of specific performance had correctly been given as it served to place the plaintiff in the position it would have been, had the SPA been performed.

Held (dismissing appeal with costs):

(1) In view of the clear claim and request for the orders by the plaintiff, the SAR had the authority to assess the damages *in lieu* of specific performance. Although the judge's order had not been that specific, it was to be concluded that because she was dealing with the issue of specific performance as pleaded by the plaintiff, she had indeed ordered that damages be assessed *in lieu* of specific performance and this was accordingly assessed by the SAR. Therefore, on the balance of probabilities, the judge's order did in fact envisage and contemplate for damages *in lieu* of specific performance to be assessed. (paras 47 & 48)

(2) In respect of s. 36 of the Specific Relief Act 1950 ('SRA'), there must be an election for the rescission of the contract by the plaintiff. Herein, the plaintiff never requested to rescind the SPA. The provision did not therefore apply against the plaintiff. Further, there could not be a dispute that the provision did not mention at all that in the event specific performance could not be enforced, no order could be made that damages *in lieu* of specific performance was to be assessed. Thus, there was no evidence to prove that the contract was rescinded. (paras 53 & 54)

(3) Section 18(4) of the SRA indicates that the court could direct as to how damages is to be assessed. The plaintiff had fulfilled the requirements of the provision above in its application for summary judgment as well as always maintaining its stand that damages *in lieu* of specific performance be awarded in the event specific performance *per se* could not be granted. Upon the failure of a contract, the court could award damages *in lieu* of specific performance. (paras 64-66)

(4) Where the innocent party had not at any time requested for the rescission of the contract, there was always the possibility that the other party to the contract would be exposed to more than just paying the refund to the innocent party. The innocent party can in that event ask for damages *in lieu* of specific performance. When the innocent party opts to rescind the contract, it follows that the party accepts only a refund is due as it agrees that the contract be put at rest but if that party does not request for rescission and is always ready to perform his part of the bargain as the plaintiff in this appeal, the same party rightfully expects more than just a refund. (para 70)

(5) There was no evidence that the judge had ordered the rescission and cancellation of the SPA to the effect that damages *in lieu* of specific performance could not therefore have been ordered by the trial judge. The order made by the judge indeed envisaged damages to be assessed *in lieu* of specific performance. The plaintiff had never intended the SPA to be rescinded and cancelled and in fact on the contrary, the plaintiff had wished for specific performance during trial. (paras 78 & 79)

(6) The plaintiff had indeed requested the refund and damages *in lieu* of specific performance. It was up to the plaintiff to prove the damages *in lieu* of specific performance. The plaintiff had done so by calling witnesses before the SAR. The defendant, on the other hand, not only failed to call witnesses in rebuttal but also chose not to challenge the valuer and her evidence called by the plaintiff. Thus, the plaintiff had proven its damages *in lieu* of specific performance. There was no issue of unjust enrichment on the part of the plaintiff as it was entitled to claim for both the refund and the damages *in lieu* of specific performance. The plaintiff could only be restored to its original position after it is awarded damages *in lieu* of specific performance. (paras 84-88)

(7) In proving damages, the calling of the plaintiff's expert witness, the valuer to give evidence of the value of the land should be accepted because the defendant had failed to call rebuttal evidence and failed to cross-examine this valuer. The failure of the defendant to call rebuttal evidence would only mean that the evidence adduced by the plaintiff must be true. In addition, on the question of the correct assessment date in law for damages *in lieu* of specific performance, it must be noted that it was not always necessary for it to be at the date of judgment. There could be different dates for the assessment of damages. The SAR was not wrong to determine the damages *in lieu* of specific performance based on the valuation report dated 25 November 2014. (paras 91-98)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Balbeer Singh Karam Singh & Ors v. Sentul Raya Sdn Bhd [2014] 7 CLJ 461 CA ***(refd)***

Berjaya Times Square Sdn Bhd v. M Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Ganam Rajamany v. Somoo Simnah [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 FC ***(refd)***

Goo Kim Yeong v. Shukri Mahmud [2015] 3 CLJ 342 HC ***(refd)***

Johnson v. Agnew [1980] AC 367 ***(refd)***

Majuikan Sdn Bhd v. Barclays Bank Plc [2014] 9 CLJ 337 CA ***(refd)***

Mariya Stephen @ Fredolin Mills v. Lee Guat Toh [2013] 1 LNS 972 CA ***(refd)***

Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor [2008] 2 CLJ 369 CA ***(refd)***

Nancy Simon SP Simon v. Peninsular Park Sdn Bhd [2008] 10 CLJ 328 HC ***(refd)***

Ong Seok Heng v. Wee Cheong Motor & Housing Developer Sdn Bhd [1990] 2 CLJ 1007; [1990] 2 CLJ (Rep) 569 HC ***(refd)***

Perbadanan Kemajuan Negeri Selangor v. PCM Bina Sdn Bhd & Ors; Astaka Intan Sdn Bhd (Third Party) [2015] 1 LNS 376 HC ***(refd)***

Riviera Promotions Sdn Bhd v. Genting Perkasa Sdn Bhd & Ors [2012] 9 CLJ 208 CA ***(refd)***

Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan Umno Negeri Pahang Darul Makmur [2015] 7 CLJ 600 CA ***(refd)***

Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd [2010] 1 CLJ 484 CA ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 81 r. 1
Specific Relief Act 1950, ss. 18(4), 23(c), 36

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For the defendant - Wong Guo & Alexia Lo; M/s Izral Partnership

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JUDGMENT

Abu Bakar Jais J:

Introduction

[1] This is an appeal to the judge in chambers by the defendant against the decision of the learned Senior Assistant Registrar ("SAR") for assessment of damages *in lieu* of specific performance where the SAR had awarded the plaintiff damages of RM1,529,550 after the assessment.

[2] This judgment discusses among others the extent of the terms of a court order and the scope upon which damages can be given *in lieu* of specific performance having regard to the provision of s. 18 of the Specific Relief Act 1950 ("SRA"). Consequently this judgment also explains whether it is always correct to say that when a contract is rescinded, no damages *in lieu* of specific performance should ensue. It also discusses whether a refund alone with limited wasted expenditure for the innocent party in an agreement failed to be performed by the other party, should be sufficient instead of ordering in addition, the assessment of further damages.

Material Facts

[3] The plaintiff as purchaser and defendant as vendor entered into a sale and purchase agreement ("SPA") where the defendant agreed to sell to the plaintiff a plot of bungalow land. This plot is situated in a proposed development project known as "Bukit Unggul Eco Media City". The defendant failed to deliver vacant possession of the land after 15 years.

[4] The development project failed too. As a consequence, the plaintiff sued the defendant and prayed for *inter alia*:

(a) specific performance of the SPA on the terms as agreed between the plaintiff and defendant in the SPA within six months from the date of judgment or within any time deemed reasonable by the court;

(b) damages in addition to specific performance; and

(c) in the alternative, the defendant refunds RM117,612.50 and pay damages to be assessed in addition to the sum 117, 612.50 to the plaintiff *in lieu* of specific performance.

[5] Thereafter the plaintiff obtained summary judgment pursuant to O. 81 r. 1 of the Rules of the High Court 1980. Pursuant to the summary judgment the relevant part of the order made by the learned judge ("learned judge") states as follows:

> Defendan membayar RM117,612.50 **dan membayar ganti rugi untuk ditaksirkan sebagai tambahan kepada jumlah RM117,612.50** tersebut kepada Plaintiff. (emphasis added)

[6] The assessment of damages *in lieu* of specific performance proceeded before the SAR with the evidence of an expert witness called by the plaintiff, a registered valuer who tendered a valuation report in respect of the bungalow plot in issue and another witness who at all material times was a director of the plaintiff. The defendant called no witnesses before the SAR.

[7] Based among others, the valuation report, the SAR awarded RM1,529,550 as damages to the plaintiff. This is not inclusive of the amount of RM241,094.44 paid by the defendant to the plaintiff before the assessment of damages by the SAR, being refund of RM117,612.50 and interest because the SPA was not performed.

Defendant's Submission

[8] In the written submission, the defendant contended that the SAR had failed to consider applicable principles and had instead considered wrong legal principles in assessing damages for this case.

[9] The SAR misunderstood the decision and order of the learned judge when she assessed the damages *in lieu* of specific performance. The defendant contended there is no such order from the learned judge.

[10] The SAR failed to realise that the learned judge did not allow specific performance of the SPA but only allowed the alternative prayer of refund of the sum RM117,612.50 paid by the plaintiff to the defendant under the SPA. What the learned judge ordered was only the SPA was rescinded and cancelled, hence the refund of that amount.

[11] Furthermore, the defendant submitted the plaintiff itself accepted that in the event no specific performance is available, it would then rely on the alternative prayer of refund of the amount and interest.

[12] Apart from the learned judge's order, the defendant argued, in law damages assessed by the SAR cannot be *in lieu* of specific performance because the SPA was already rescinded and cancelled, thus no contract can be specifically performed. There cannot be an assessment of damages *in lieu* of specific performance, when in the first place, specific performance is not available.

[13] The plaintiff cannot be entitled in law to both refund and damages. To allow both will be manifestly inequitable as the plaintiff will be unjustly enriched with the damages when it has not expended money or risk. The most that can be allowed if this court thinks so is damages for wasted expenditure and not loss of profit.

[14] The defendant had paid the amount RM241,094.44 for refund and interest before assessment of damages by the SAR. This has the effect of restoring the plaintiff to its original position. Therefore, the plaintiff must also relinquish all claims including specific performance in order to restore the defendant also back to its original position.

[15] Further, the plaintiff had not proven damages as there was no evidence to prove actual loss.

[16] It was wrong for the SAR to use the plaintiff's valuation report for the bungalow plot and make the assessment at the date 25 November 2014. The date of assessment of damages for the bungalow lot should have been on the date of summary judgment 15 March 2012.

[17] In the defendant's written reply the following points are raised.

[18] Although the defendant did not call its witnesses for the assessment of damages before the SAR, it was still the case for the plaintiff to prove its damages. Adverse inference cannot be levelled against the defendant as the plaintiff had not proven its case.

[19] Since the plaintiff was never entitled to damages *in lieu* of specific performance, the expert evidence the plaintiff adduced is irrelevant to prove actual loss.

[20] The learned judge's order is for only damages to be assessed in addition to the refund and not damages *in lieu* of specific performance.

[21] The plaintiff's submission on the case *Ong Seok Heng v. Wee Cheong Motor & Housing Developer Sdn Bhd* [1990] 2 CLJ 1007; [1990] 2 CLJ (Rep) 569 is irrelevant and inapplicable as this case dealt with s. 18 of the SRA.

[22] The SPA was not specifically enforceable and the refund and restitution ordered is already targeted to restore parties to the original positions.

[23] The plaintiff is not entitled to loss of profit under the learned judge's order especially when the refund had already been made.

[24] There is no point to call the expert witness by the plaintiff as the plaintiff is not entitled to loss of profit in the first place.

[25] The award of loss of profit goes against the principle of restitution which is to place the parties back to its original positions. Therefore, there is no need for the defendant to rebut the plaintiff's expert witness on the same point.

[26] In the event this court decides that such damages can be awarded, it is wrong to assess damages based on the date 25 November 2014. A

[27] The plaintiff is unjustifiably enriched by the award of damages after assessment by the SAR as the refund had already been paid with interest.

[28] As seen there are several points which were repeated in the defendant's written reply from the earlier written submission of the same including on the issue whether the assessment should be based on the valuation report as at 25 November 2014 and that the refund had been paid. B

[29] Therefore, when I elaborate on these submissions in a short while, I would not state the same point twice except to emphasise the significance of certain points. C

Plaintiff's Submission

[30] In the written submission the plaintiff argued that since the defendant did not call any witnesses before the SAR, the evidence of the valuer should be assumed to be true. And because the defendant did not call any witnesses, adverse inference should apply against the defendant. D

[31] The plaintiff submitted that the SAR was correct in her assessment of damages in taking into account the market value of the plot of land and deducting the purchase price of the same. E

[32] According to the plaintiff the order made by the learned judge as narrated earlier for assessment of damages is *in lieu* of specific performance as there is an alternative prayer for that.

[33] There is no reasons to disturb the findings of the SAR in her assessment of damages as she had heard witnesses and had not acted under wrong principles. The award of damages is neither inadequate nor unduly excessive. F

[34] In the written reply, the plaintiff contended that the order of the learned judge allowing for damages to be assessed means that the damages are consistent with s. 18 of the SRA in the form of compensation. In this regard the plaintiff had complied with the conditions in this particular provision. G

[35] The compensation here is effectively damages *in lieu* of specific performance. There is no need of the words "damages *in lieu* specific performance" be mentioned in this provision for such damages to be awarded. H

[36] The defendant did not argue that the SPA is rescinded even at the stage the SAR did her assessment of damages. This argument should not be taken into account now. There is in any event never a prayer by the plaintiff that the SPA be rescinded or cancelled. I

[37] The plaintiff is entitled to both refund and damages *in lieu* of specific performance as the plaintiff had never prayed for the recession or cancellation of the SPA.

[38] The plaintiff had proven losses by producing the valuation report and the evidence of the valuer. The defendant did not challenge these evidence.

[39] The damages *in lieu* of specific performance has correctly been given as it serves to place the plaintiff in the position it would have been, had the SPA been performed.

Court's Findings

The Scope Of The Learned Judge's Order

[40] First, as apparent from the submission of the defendant as narrated earlier, one important facet of the defendant argument in respect of the appeal revolves on the learned judge's order which is also shown earlier. The issue connected to this order is whether that order in effect requires damages to be assessed *in lieu* of specific performance or merely for additional damages to be assessed apart from the refund. If it is the latter, the damages should only be as submitted by the defendant at the most, for wasted expenditure and not loss of profit.

[41] As narrated that the order merely says the defendant to pay damages to be assessed in addition to RM117,612.50. There is no dispute this amount of RM117, 612.50 is the refund for the amount already paid by the plaintiff in respect of the SPA. The order does not state that the damages to be assessed is *in lieu* of specific performance. Neither does it state as submitted by the defendant, the assessment is only at best in respect of wasted expenditure.

[42] The SAR, however, took that order to mean damages to be assessed *in lieu* of specific performance and proceeded to assess damages on that understanding.

[43] Based on the circumstances as narrated above, the duty of this court is to ascertain the scope of the learned judge's order and in corollary to state whether the SAR was correct to assess damages *in lieu* of specific performance.

[44] In this regard, first is this court responsibility to see what was pleaded by the plaintiff in respect of its claim against the defendant. Is there for instance a claim for specific performance? Is there also prayer that in the event specific performance cannot be ordered, an alternative prayer is requested that *in lieu* of specific performance, damages be assessed?

[45] There is no dispute that in the pleading the plaintiff had prayed for specific performance. There is no dispute too that in the event the court orders that specific performance is not allowed, the plaintiff had requested for damages to be assessed *in lieu* of specific performance.

[46] As narrated in the material facts in the early part of this written judgment the plaintiff prayed for:

(a) specific performance of the SPA on the terms as agreed between the plaintiff and defendant in the SPA within six months from the date of judgment or within any time deemed reasonable by the court;

(b) damages in addition to specific performance; and

(c) in the alternative, the defendant refunds RM 117,612.50 and pay damages to be assessed in addition to the sum 117, 612.50 to the plaintiff *in lieu* of specific performance.

[47] In view of the clear claim and request for the orders by the plaintiff as narrated above, it is wrong to say that the SAR has no authority to assess the damages *in lieu* of specific performance. Although the learned judge's order is not specific that the assessment of damages is *in lieu* of specific performance, it is only reasonable to find that was indeed the intended effect the learned judge had in mind with regard to her order. She obviously must have been aware of the plaintiff's prayers pertaining to the issue of specific performance as narrated above. As stated although the learned judge's order has not been that specific, it is to be concluded that because she was dealing with the issue of specific performance as pleaded by the plaintiff, she had indeed ordered that damages be assessed in lieu of specific performance and this was according assessed by the SAR.

[48] The attempt by the defendant to capitalise on the seemingly unclear order should be scrutinised by this court. And this attempt could be answered by pointing out to the defendant that this is not a case where damages *in lieu* of assessment had not been pleaded at all. On the contrary, as narrated and shown earlier the plaintiff indeed had pleaded so. Therefore, on the balance of probabilities, the learned judge's order did in fact envisage and contemplate for damages *in lieu* of specific performance to be assessed.

Section 36 Of SRA

[49] A major part of the contentions of both the plaintiff and defendant also revolves on the issue of whether damages *in lieu* of specific performance can be ordered to be assessed when the SPA had been rescinded and cancelled.

[50] However, it should be pointed out at the outset, the assertion and submission by the defendant that the SPA is rescinded, cannot be accepted by this court because the defendant had not at all shown the evidence that this is indeed the case.

[51] Nonetheless, the defendant had argued since the SPA is rescinded and cancelled, the SAR was wrong to assess damages *in lieu* of specific performance. There is no issue of specific performance according to the defendant because the SPA had been rescinded. In this regard the defendant quoted s. 36 of the SRA which states:

A Alternative prayer for rescission in suit for specific performance

A plaintiff instituting a suit for the specific performance of contract in writing *may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled, and the court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.* (emphasis added)

B

[52] Also cited is the decision of the Federal Court's in the case of *Ganam Rajamany v. Somoo Sinnah* [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123; [1984] 2 MLJ 290 regarding this provision which states:

C In our judgment the defendant is not entitled to damages when the contracts are cancelled by the court under section 36 of the Specific Relief Act 1950 and we make no order under this head.

[53] First in respect of s. 36 of the SRA as narrated, there must be an election for the rescission of the contract by the plaintiff. For the present appeal, the plaintiff never requested to rescind the SPA. The provision does not, therefore, apply against the plaintiff.

D

[54] Second there cannot be a dispute that the provision did not mention at all that in the event specific performance cannot be enforced, no order can be made that damages *in lieu* of specific performance is to be assessed. It only says if the contract cannot be enforced specifically, the court may direct the contract be rescinded. Further the word "may" clearly indicates it is not mandatory that the contract is rescinded.

E

[55] Third in the case of *Ganam d/o Ramasamy* as cited, there is a finding that the contract is rescinded or cancelled. On the contrary, in the present appeal, there is no evidence to prove that the contract is rescinded.

F

[56] Fourth in fact in the above case, the Federal Court said:

But the rescission of a contract in writing cannot be adjudged **unless the party against whom it is adjudged can be restored to substantially the same position** as if the contract had not been made. (emphasis added)

G

[57] Therefore, taking note of the above passage, whether a party can be restored to substantially the same position is a question of fact of each particular case. This is why courts had found it fit to order damages *in lieu* of specific performance in appropriate cases. Indeed that is what happened in respect of the learned judge's order here. She had ordered assessment *in lieu* of specific performance as she deemed it fit to do so. That is why she had ordered further damages to be assessed in addition to the refund. She would not have ordered so had she disagreed that damages *in lieu* of specific performance is proper.

H

I

Section 23(c) Of SRA

[58] The defendant cited s. 23(c) of the SRA to say since the plaintiff had been paid the refund and interest, it cannot be allowed specific performance. This section states:

> Specific performance of a contract cannot be enforced in favour of a person –
>
> (c) who has already chosen his remedy and obtained satisfaction for the alleged breach of contract.

[59] It is obvious this provision cannot be applicable for this appeal because there is no evidence adduced by the defendant that the plaintiff is satisfied with the remedy of just being paid the refund and interest. On the contrary as pointed out earlier, the plaintiff had requested and maintained its prayer for damages *in lieu* of specific performance. Therefore, to say that the plaintiff is satisfied of the remedy obtained is misleading.

Whether Refund And Damages Can Be Ordered

[60] It is contended by the defendant that the plaintiff cannot be entitled to both refund and damages. For this proposition the defendant cited the Federal Court's case of *Berjaya Times Square Sdn Bhd v. M Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597 that states:

> In other words where there has been a total failure of consideration, the innocent party has the alternative remedy of suing to recover monies paid under the contract to the guilty party. But it can under no circumstances have his money returned and claim damages.

[61] First it is important to point out Berjaya Times Square is a case where the innocent party asked for declaration that the agreement had been rescinded. This is different from this case presently for appeal as the plaintiff had always maintained for specific performance and not rescission.

[62] Second Berjaya Times Square did not at all discuss s. 18 of the SRA which states:

> *(1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance.*
>
> *(2) If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach it shall award him compensation accordingly.*
>
> ILLUSTRATION
>
> *A contracts to sell a hundred gantangs of rice to B. B brings a suit to compel A to perform the contract or to pay compensation. The court is of opinion that A has made a valid contract and has broken it, without excuse, to the injury of B, but that specific performance is not the proper remedy. It shall award to B such compensation as it deems just.*

A (3) If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

ILLUSTRATION

B A contracts with B to sell him a house for RM1,000, the price to be paid and the possession given on the 1st January. A fails to perform his part of the contract, and B brings his suit for specific performance and compensation, which is decided in his favour. The decree may besides ordering specific performance, award to B compensation for any loss which he has sustained by A's refusal.

C *(4) Compensation awarded under this section may be assessed in such a manner as the court may direct.*

(5) The circumstance that the contract has become in capable of specific performance shall not preclude the court from exercising the jurisdiction conferred by this section. (emphasis added)

D **[63]** As can be seen this provision do allow for compensation or damages to be awarded *in lieu* of specific performance especially when one considers the illustration to that section. Compensation here is damages as defined in *Osborn's Concise Law Dictionary* (7th edn) that states "damages" means:

E Compensation or indemnity for loss suffered owing to a Tort or breach of contract or breach of some statutory duty committed by some other person. The principle is that the injured party should be put as nearly as possible in the same position, so far as money can do it, as if he had not been injured. Damages from the same cause must be recovered once and for all.

F **[64]** Section 18(4) of the SRA above also indicates the court can direct as to how damages is to be assessed. In this regard as stated the damages was assessed by the SAR.

[65] The facts as narrated for this case too indicate that the plaintiff had G fulfilled the requirements of the provision above in its application for summary judgment as well as always maintaining its stand that damages *in lieu* of specific performance be awarded in the event specific performance *per se* cannot be granted.

[66] It is crucial to note that with this statutory provision in our own H jurisdiction, upon the failure of a contract, the court can award damages *in lieu* of specific performance. In short, this s. 18 of the SRA as narrated is authority that such damages can be ordered when there is no evidence that the contract had been rescinded upon the request of the innocent party. This interpretation too falls consistently with Berjaya Times Square and do not in I manner conflict the same.

[67] In fact in respect of s. 18 of the SRA, the courts had consistently ordered damages *in lieu* of specific performance and an example of this is the case of *Goo Kim Yeong v. Shukri Mahmud* [2015] 3 CLJ 342 where it states:

As the defendant had entered into a sale and purchase agreement in respect of the same property with Fox Custom Tailor Sdn Bhd, this court is of the view that *specific performance is not suitable or possible* in the circumstances.

In the alternative and as claimed by the plaintiff, this court award damages pursuant to ss. 18(1) and (2) of the Specific Relief Act 1950.

As explained by the Court of Appeal in *Balbeer Singh Karam Singh & Ors v. Sentul Raya Sdn Bhd* [2014] 7 CLJ 461 at p. 477 as follows:

> *Clearly, pursuant to s. 18(5) of the Act, the court is not precluded from awarding damages, and pursuant to s. 18(2), holding that in the circumstances of impossibility specific performance ought not to be granted, but that there being a contract between the parties which has been broken by the respondent and that the appellants are entitled to compensation for that breach, the court must award compensation accordingly in lieu of specific performance.* It is appropriate, in the circumstances, that such compensation be assessed by the Deputy Registrar of the High Court by comparison with an average market values of comparable units in the vicinity and deducting therefrom the purchase price under the SPAs in each case.

As regard to damages for breach of contract, *the general principal is that the innocent party is to be placed as far as money can do, in the same position as if the contract had been performed.*

(See *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holding Sdn Bhd* [1995] 1 CLJ 15; [1994] 3 MLJ 777 (FC)).

(emphasis added)

[68] Another case with regard to the operation of s. 18 of the SRA where damages *in lieu* of specific performance was allowed is the case of Ong Seok Heng cited earlier which also deals with the issue of the date upon which such damages should be awarded and on this issue, it will elaborated further in a short while.

[69] Besides in the case of *Nancy Simon SP Simon v. Peninsular Park Sdn Bhd* [2008] 10 CLJ 328 Hishamudin Yunus J (as he then was) ordered both refund of the money paid as well as damages *in lieu* of specific performance. The case *Balbeer Singh Karam Singh & Ors v. Sentul Raya Sdn Bhd* [2014] 7 CLJ 461; [2014] 5 MLJ 491 quoted in Goo Kim Yeong also ordered for both refund and damages *in lieu* of performance.

[70] At this stage it ought to be explained, based on the provisions of the SRA and all case law highlighted, where the innocent party had not at any time requested for the rescission of the contract unlike Berjaya Times Square, there is always the possibility that the other party to the contract will be exposed to more than just paying the refund to the innocent party. The innocent party can in that event ask for damages *in lieu* of specific performance. When the innocent party opts to rescind the contract it follows

A that party accepts only a refund is due as it agrees that the contract be put at rest but if that party does not request for rescission and is always ready to perform his part of the bargain as the plaintiff in this appeal, the same party rightfully expects more than just a refund.

The SAR's Judgment

B

[71] The SAR gave her reasons in a written judgment as to the damages she awarded *in lieu* of specific performance and the amount of damages she thought that ought to be awarded to the plaintiff. She referred to the learned judge's order and laid down the arguments of both the plaintiff and defendant before her.

C

[72] She pointed out the assessment of damages is to compensate the injured party and said it was not to enrich any party. She gave her reasons on how and why she had arrived at the amount of damages for the plaintiff. She took into account the open market value of the land and minus the purchase price of the same. She referred to some case law in supporting her decision.

D

[73] Looking at her written grounds as a whole, I do not think it is fair for the defendant to argue that the SAR had failed to consider applicable principles and had instead considered wrong legal principles in assessing damages for this case. As elaborated the points explained in this judgment will show she had not acted wrongly and it is a fact she was not given the chance to address certain issue such as whether the plaintiff's valuation report dated 25 November 2014 can be used when the summary judgment was given on 15 March 2012 as this issue was not raised by the defendant before her. There was also no argument before her by the defendant as it is now that the SPA is rescinded.

E

F

[74] Further, it is important to always bear in mind that since this is an appeal against her decision, this court as the appellate court in the present appeal should be slow in interfering with her finding of facts since she had heard witnesses and the demeanour of the same. See the decision of the Court of Appeal in *Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan Umno Negeri Pahang Darul Makmur* [2015] 7 CLJ 600; [2016] 2 MLJ 276.

G

[75] The assessment of damages by the SAR based on the evidence of witnesses, had indeed not proceeded on the wrong principles and instead had taken into account applicable principles and I do not think the damages awarded to the plaintiff is unjustifiably excessive.

H

The Defendant's Arguments

[76] I shall now be alluding to every contention of the defendant, lest there be baseless accusation that I had failed to address each point of the submission of the defendant in arriving at my decision on this appeal. This part of the judgment is excluding the contention that the learned judge never

I

ordered damages to be assessed *in lieu* of specific performance as I have already addressed this point earlier. For easier reading and understanding, the other defendant's contentions are listed below in the form of issues that arose from such submission of the defendant.

(i) Whether It Is Correct To Say That The Learned Judge Had Found The SPA Is Rescinded And Cancelled

[77] The first issue that arose pertaining to the arguments of the defendant is whether the learned judge had ordered the rescission and cancellation of the SPA to the effect that damages *in lieu* of specific performance cannot, therefore, have been ordered by the learned judge.

[78] First there is no evidence that the learned judge had decided so. There is no judgment to that effect and neither did the defendant able to show the notes of evidence to suggest that was indeed ordered by the learned judge. If that is indeed the case, the defendant surely would be in a position to show the notes of evidence or the judgment that indicates the learned judge had in fact decided so. But the defendant failed to do this. The sum effect is that it is not true to say that the learned judge had ordered the rescission and cancellation of the SPA.

[79] Without such finding by the learned judge, it lends more credence to the facts:

(a) the order made by the learned judge indeed envisages damages to be assessed *in lieu* of specific performance and

(b) the plaintiff never intended the SPA to be rescinded and cancelled and in fact on the contrary, the plaintiff had wish for specific performance even during trial.

(ii) Whether The Defendant Is Correct To Submit The Plaintiff Itself Accepted That In The Event No Specific Performance Is Available, It Would Then Rely On The Alternative Prayer Of Refund And Interest

[80] Here I do not find that the plaintiff had opted to rely solely on the refund alone if specific performance is not available. This respectfully was not the allowance conceded by the plaintiff. On the contrary, I find that the plaintiff is not refusing refund if that is ordered but has always maintained its right to damages *in lieu* of specific performance if specific performance cannot be ordered. This is seen in the statement of claim of the plaintiff.

[81] In fact it is ironic that the defendant itself had pointed out in its written submission the plaintiff prayed that:

(a) alternatively the defendant to pay the sum of R 117,612.50 and pay damages to be assessed in addition to the said sum of RM117,612.50 to the plaintiff *in lieu* of specific performance; and

(b) additional damages to be assessed to specific performance.

[82] The above pointed out by the defendant itself means it is not correct for the defendant to submit the plaintiff itself accepted that in the event no specific performance is available, it would then rely solely on the alternative prayer of refund of the amount and interest.

(iii) Whether The Damages Assessed By The SAR Cannot Be In Lieu Of Specific Performance Because The SPA Is Already Rescinded And Cancelled, Thus No Contract Can Be Specifically Performed

[83] Here again the issue relates to the question whether in the first place the SPA was found to be rescinded and cancelled. The above issue only holds true if it was found by the learned judge the SPA was indeed rescinded and cancelled. However, as explained earlier there is no evidence to show there is such finding by the learned judge.

(iv) Whether The Plaintiff Cannot Be Entitled In Law To Both Refund And Damages As To Allow Both Will Be Manifestly Inequitable As The Plaintiff Will Be Unjustly Enriched With The Damages When It Has Not Expended Money Or Risk

[84] I find that the plaintiff had indeed requested the refund and damages *in lieu* of specific performance as noted by the defendant itself as explained earlier. Leaving aside the issue of refund which is not disputed by the defendant that the plaintiff is entitled to, the remaining question is to see whether the plaintiff can be granted assessment of damages *in lieu* of specific performance.

[85] In this regard, it is up to the plaintiff to prove the damages *in lieu* of specific performance. And the plaintiff had done so by calling witnesses before the SAR. It is not disputed the defendant on the other hand not only failed to call witnesses in rebuttal but also chose not to challenge the valuer and her evidence called by the plaintiff. Thus, indeed the plaintiff had proven its damages *in lieu* of specific performance and in that sense it is also incorrect for the defendant to suggest the most that can be awarded is damages for wasted expenditure.

[86] There cannot be an issue of unjust enrichment on the part of the plaintiff as it is entitled to claim for both the refund and damages *in lieu* of specific performance.

(v) Whether The Defendant By Paying The Amount Of RM241,094.44 For Refund And Interest Before Assessment Of Damages By The Sar Had Restored The Plaintiff To Its Original Position And Thus This Would Mean The Plaintiff Must Relinquish All Claims Including Specific Performance In Order Also To Restore The Defendant Back To Its Original Position

[87] The question that arises from the above issue is whether in the first place it is true to say since the defendant had paid the amount of RM241,094.44 for refund and interest before assessment of damages by the SAR, the defendant had restored the plaintiff to its original position.

[88] In this regard as explained the cases *Nancy Simon* and *Balbeer Singh* had ordered for both refund and damages *in lieu* of specific performance. Therefore it is incorrect for the defendant to assert just because it had made this payment for refund and interest, the plaintiff has been restored to its original position. The plaintiff can only be restored to its original position after it is awarded damages *in lieu* of specific performance. The Court of Appeal's case of *Riviera Promotions Sdn Bhd v. Genting Perkasa Sdn Bhd & Ors* [2012] 9 CLJ 208 is a case where damages *in lieu* of specific performance was granted precisely with the view of substituting the relief of specific performance and it is intended to place the plaintiff to the same position had the contract been performed by the defendant.

(vi) Whether The Plaintiff Had Not Proven Damages As There Was No Evidence To Prove Actual Loss

[89] With regard to this issue the defendant seems without basis unable to appreciate that the calling of the valuer by the plaintiff is to prove damages *in lieu* of specific performance. It is to compensate for the loss of the plaintiff because specific performance cannot be carried out and for not being able to have that plot of land.

[90] It is, therefore, not true for the defendant to assert the plaintiff had not proven damages as there was no evidence to prove actual loss.

[91] In proving damages, the calling of the plaintiff's expert witness, the valuer to give evidence of the value of the land should be accepted because the defendant failed to call rebuttal evidence and failed to cross-examine this valuer. In this regard Mohamad Ariff Yusof JCA (as he then was) in *Majuikan Sdn Bhd v. Barclays Bank Plc* [2014] 9 CLJ 337 explained the need to accept such evidence when he said:

> We are in agreement with these principles and in our view, **a judge who is not an expert himself, should defer to expert opinion** unless that evidence is obviously indefensible and is not supported by the basic facts of the case. Where there are conflicting expert opinions, the judge is of course entitled to bring to bear his own judicial appreciation of the matter, and choose one over the other, *but where there is only one expert opinion, he should not as a rule reject that opinion outright without judiciously considering whether it is obviously indefensible and unsupported by the basic facts of the case.* (emphasis added)

[92] While in the case *Perbadanan Kemajuan Negeri Selangor v. PCM Bina Sdn Bhd & Ors; Astaka Intan Sdn Bhd (Third Party)* [2015] 1 LNS 376 it is said:

> In the present case, *the 1st Defendant had not adduced any sufficient evidence to challenge the Plaintiff's expert evidence and therefore the Court should accept the evidence by the Plaintiff's expert witnesses.* (emphasis added)

(vii) Whether It Was Wrong For The SAR To Use The Plaintiff's Valuation Report For The Bungalow Plot And Make The Assessment As At The Date 25 November 2014 When The Date Of Assessment Of Damages For The Bungalow Lot Should

Have Been On The Date Of Summary Judgment 15 March 2012

[93] First the above issue as pointed out earlier was not raised in the assessment of damages before the SAR. What was raised then was merely that damages should be assessed at the date of breach of the SPA and since there was no date of completion in the SPA, there is no date of breach. This is totally different from the issue raised above.

[94] In addition, on the question of the correct assessment date in law for damages *in lieu* of specific performance it must be noted that it is not always necessary it is at the date of judgment. There could be different dates for the assessment of damages and this is best explained in the House of Lords case of *Johnson v. Agnew* [1980] AC 367 where it is said:

> *The general principle for the assessment of damages is compensatory, ie, that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed.* Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach – a principle recognized and embodied in section 51 of the Sale of Goods Act 1893. But this is not an absolute rule*: if follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.* (emphasis added)

[95] Also in the case of Ong Seok Heng mentioned earlier where Mohamed Dzaidin J (as he then was) elaborated:

> This means the market value is to be assessed as at the time when the breach occurred. *However, there are cases where the Courts had determined the market value of the property on some other dates, e.g., the date of judgment.* In *Cheng Chuan Development Sdn Bhd v. Ng Ah Hock* [1982] 1 LNS 48; [1982] 2 MLJ 222, the Federal Court, affirming the decision of the trial Judge, assessed damages to be the difference between the contract price and the price at which the shophouse was sold to the third party. In *Tan Geok Khoon & Anor v. Paya Terubong Est. Sdn. Bhd*. (Penang High Court Civil Suit No. 831 of 1984), Datuk Edgar Joseph Jr. J held that the relevant date for assessment of damages would be the date of judgment especially since there was no evidence that they would be greater if assessed at the date of breach. In *Johnson v. Agnew* [1980] AC 367, the House of Lords held that the date of assessment of damages for claim of specific performance should be that at the date when the contract was lost which would be the date of the hearing of the specific performance.
>
> (emphasis added)

[96] From the above passages I would say that the SAR was not wrong to determine the damages *in lieu* of specific performance based on the valuation report dated 25 November 2014. As explained by the case law above, there could be different dates and not necessarily only when the summary judgment was pronounced.

[97] Further what is clear is that when the valuer testified with the valuation report as at 25 November 2014, this testimony was not challenged by the defendant. In this regard, based on *Aik Ming (M) Sdn Bhd & Ors v.*

Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639; [1995] 2 MLJ 770 it is trite that when there is no cross-examination of a witness, the defendant here is barred from raising the issue in its argument. Thus, it was not wrong and it is acceptable to admit and assessed damages as at 25 November 2014.

[98] Also the failure of the defendant to call rebuttal evidence would only mean that the evidence adduced by the plaintiff must be true. See *Mariya Stephen @ Fredolin Mills v. Lee Guat Toh* [2013] 1 LNS 972; [2014] 1 MLJ 809, *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484; [2011] 4 MLJ 805 and *Mohd Nor Afandi bin Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* [2008] 2 CLJ 369; [2008] 3 MLJ 81.

[99] Even if it is correct to say that although the defendant did not call its witnesses for the assessment of damages before the SAR, it was still the case for the plaintiff to prove its damages, the plaintiff had in fact called witnesses to prove damages and the testimony of these witnesses was not challenged. Hence, even if no adverse inference can be levelled against the defendant, the plaintiff has proven its case.

(viii) Whether It Is Correct For The Defendant To Submit That Since The Plaintiff Was Never Entitled To Damages In Lieu Of Specific Performance, The Expert Evidence The Plaintiff Adduced Is Irrelevant To Prove Actual Loss

[100] First as pointed out, the finding of this court is that the learned judge had ordered damages be assessed *in lieu* of specific performance. By virtue of the order, it was not opened for the defendant to argue that the plaintiff was never entitled to the same.

[101] Second there can be no doubt that the learned judge had ordered additional damages to be assessed apart from the refund. This is clear from the order itself. Hence, there is again reason to suggest that order has the effect of ordering damages to be assessed *in lieu* of specific performance.

[102] Third this court has also explained the provision of s. 18 of the SRA to the effect that the plaintiff can claim for damages *in lieu* of specific performance.

[103] All these reasons prove that the defendant is incorrect to say that since the plaintiff was never entitled to damages *in lieu* of specific performance, the expert evidence the plaintiff adduced is irrelevant to prove actual loss.

(ix) Whether The Defendant Is Right To Say The Plaintiff's Submission On The Case Ong Seok Heng Is Irrelevant And Inapplicable As This Case Dealt With s. 18 Of The SRA

[104] As pointed out earlier the case Ong Seok Heng is also a case quite similar to the case of the plaintiff where damages *in lieu* of specific performance was allowed. In this regard precisely because the damages was allowed by virtue of s. 18 of the SRA which was elaborated earlier, I do not agree with the defendant it is irrelevant. On the contrary as explained this

is our own statutory provision and, therefore, should not be subjected to other laws on the same subject of whether damages *in lieu* of specific performance can be given. Indeed this provision specifies that such damages can be awarded *in lieu* of specific performance.

(x) Whether It Is Correct For The Defendant To Say There Is No Breach On Part By The Defendant In Respect Of The SPA And Therefore It Was Wrong To Further Assess Damages In Lieu Of Specific Performance

[105] On this issue the defendant would not be able to deny based on the case law highlighted, the statutory provision elaborated and the learned judge's order explained all point to the fact that indeed the plaintiff can be awarded damages *in lieu* of specific performance. It therefore is unacceptable for the defendant to say hence it was wrong to further assess damages *in lieu* of specific performance.

(xi) Whether It Was True For The Defendant To Submit That The SPA Was Not Specifically Enforceable And The Refund And Restitution Ordered Is Already Targeted To Restore Parties To The Original Positions

[106] On this issue there is no dispute that indeed the learned judge did not order specific performance and the refund is targeted to restore the parties to its original positions but that in itself cannot be the end of the issue as it is statutorily provided as explained earlier damages *in lieu* of specific performance can be also be ordered for the plaintiff.

[107] The refund ordered and paid too do not mean that the case has already be determined to its conclusion for the defendant to say that the plaintiff's claim can be closed and sealed. The learned judge's order as explained goes beyond that in requiring additional damages to be assessed. And accordingly the SAR had correctly assessed damages *in lieu* of specific performance.

(xii) Whether The Defendant Can Argue That The Plaintiff Is Not Entitled To Loss Of Profit Under The Learned Judge's Order Especially When The Refund Has Already Been Made

[108] It is a fact that the plaintiff had not at any point of time argued for loss of profit even before the SAR. The defendant had misapprehended the aim of the assessment of damages before the same. It is actually to award the plaintiff damages *in lieu* of specific performance. It is to compensate the plaintiff because the defendant had failed to honour its bargain. There is no issue of loss of profit per se as the defendant attempts to put it.

(xiii) Whether It Is Correct For The Defendant To Submit There Is No Point To Call The Expert Witness By The Plaintiff As The Plaintiff Is Not Entitled To Loss Of Profit In The First Place

[109] The issue of loss of profit as stated was never raised by the plaintiff at any point of time. Therefore, the defendant failure to call witnesses or to cross-examine the plaintiff's witnesses is only to the detriment of the defendant. The defendant must call witnesses in rebuttal to the evidence of

the plaintiff's witnesses or the very least challenge the witnesses of the plaintiff by cross-examining them. The failure to do this as explained by the case law only means that the evidence of the plaintiff's witnesses are acceptable to be the truth.

(xiv) Whether It Is True For The Defendant To Say The Award Of Loss Of Profit Go Against The Principle Of Restitution Which Is To Place The Parties Back To Its Original Position. Therefore There Is No Need For The Defendant To Rebut The Plaintiff's Expert Witness On The Same Point

[110] This point is a non-starter for the defendant because there is no evidence that the plaintiff had asserted for a loss of profit in relation to non-performance of the SPA by the defendant. The assessment of damages *in lieu* of specific performance is as explained to compensate the plaintiff because of this failure of the defendant.

(xv) Whether The Plaintiff Is Unjustifiably Enriched By The Award Of Damages After Assessment By The SAR As The Refund Has Already Been Paid With Interest

[111] The law as stated shows that the plaintiff is indeed entitled to damages *in lieu* of specific performance. There is no issue of getting enriched despite the refund being paid. As explained the plaintiff is also entitled to the damages. The defendant is simply wrong to think that by paying the refund the plaintiff could not proceed to ask for damages *in lieu* of specific performance.

Conclusion

[112] The learned judge's order is for assessment of damages *in lieu* of specific performance. The SAR had correctly proceeded to assess damages based on that order.

[113] With respect, it is incorrect for the defendant to submit that there cannot be both refund and damages *in lieu* of specific performance in all cases. The statutory provision highlighted allows for damages *in lieu* of specific performance and the case law shown also have decided to the same effect.

[114] The assessment of damages can be based on the date of the valuation report as the case law indicate that different dates can be determined for the assessment of damages.

[115] For all the reasons adumbrated, the appeal is dismissed with costs to the plaintiff.